



Military Installation Real Property and Services: Proposed Legislation in the 111th Congress

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Summary

Several bills (S. 590, H.R. 1959, and H.R. 2295) that would modify or expand statutory authorities granted to senior executives of the Department of Defense (DOD) have been introduced to the 111th Congress. These authorities relate to the exchange of real property, the outsourcing of some military installation support services, and the reimbursement by DOD of some costs associated with military site cleanup. The proposed legislation would also amend the Defense Base Closure and Realignment Act of 1990, the BRAC law, to expand existing legal protections granted to those who have taken title to property at closed military bases and to set conditions under which future title transfers for surplus military property would be carried out at no cost to the recipient.

S. 590 and H.R. 2295 are identical. If enacted, these bills would render permanent an expired authority held by the Secretary of Defense (or the Secretary of a military department) to exchange any defense real property for real property held by non-DOD entities if the exchange will limit encroachment on military activities or will relieve a shortage of military housing. They would also expand and make permanent a limited pilot program that allows certain services currently performed at military installations by DOD employees or private contractors to be non-competitively outsourced to municipal or county governments.

Another section in the bills would expand the authority of the Secretary of Defense to enter into a cost-reimbursement agreement for the cleanup of a military site. Current law permits agreements that reimburse federal, state, and local agencies and other entities for certain costs incurred by participation in a cleanup program. The bill would allow reimbursement agreements to include costs incurred in the “processing” of a transfer of title of federal property and would prevent the Secretary from imposing certain conditions on the funding made available.

The remaining sections of the bills would amend the Defense Base Closure and Realignment Act of 1990, the so-called BRAC law. They would expand the legal protections available to persons who have taken title to property on closed military bases and would require the conveyance of surplus military property at no cost if certain conditions are met.

This report analyzes the key provisions of the legislation, identifies probable effects of the proposed amendments to existing law, and suggests issues raised for congressional consideration.

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Introduction

Some Members of Congress have expressed concern that the cost of redeveloping closed military property may place a burden on local communities. On March 12, 2009, Senator Olympia Snowe (Maine) introduced in the 111th Congress on behalf of herself and Senator Mark L. Pryor (Arkansas), the “Defense Communities Assistance Act of 2009” (S. 590). As stated under its Section 2 (Sense of Congress), the legislation is intended to assist communities located near military installations “to either recover quickly from [military base] closures or to accommodate growth associated with troop influxes” brought on by the movement of troops and activities as part of “base closures and realignments, global repositioning, and grow the force initiatives.”

Representative Chellie Pingree (Maine) introduced the “Defense Communities Redevelopment Act of 2009” (H.R. 1959) on April 2, 2009. The bill duplicates the no-cost conveyance section of S. 590. Representative Sam Farr, of California, introduced H.R. 2295 on May 7 on behalf of himself, Representative Kay Granger (Texas), Representative Pingree, and Representative William Delahunt (Massachusetts) as an identical companion bill to S. 590. The three Senate and House bills have been referred to their respective Committees on Armed Services.

Conveying Property to Gain Construction and Avoid Encroachment

Current Statute

10 USC § 2689 authorizes the Secretary of Defense or any military department (Army, Navy, or Air Force) to convey real property to any legal entity in exchange for either other real property to limit encroachment that might restrict military activities or for housing at or near a military installation that is experiencing a housing shortage.¹ The Secretary may transfer only property under his jurisdiction that is located on an installation being closed or realigned. Until his authority to do so expired on September 30, 2008, the Secretary could also use this conveyance authority for any other military property declared excess to defense needs.²

The fair market value of the property, as determined by the Secretary, received in the exchange must be at least equal to that being conveyed. Should the received property’s value be less than that exchanged, the person must pay the United States an amount equal to the difference.

¹ *Encroachment* implies a gradual intrusion upon the rights or possessions of another. In the context of this report, encroachment connotes the development of private property near an installation for a use incompatible with the military mission. An example might be the construction of a residential area under the flight pattern of a military airfield, or the siting of a school adjacent to a military firing range. A *conveyance* is the transfer of legal title, or ownership, of property. *Real property* is defined as land, and generally whatever is erected or growing upon or fixed to land (e.g., buildings). Henry Campbell Black, *Black’s Law Dictionary*, Rev. 4th ed. (St. Paul, MN: West Publishing Co., 1968), pp. 402, 1383.

² 10 U.S.C. § 2869(a)(3).

Advance notice of any conveyance under this section must be announced in a manner prescribed by the Secretary of Defense. When military property is to be conveyed by public sale, the Secretary concerned may notify prospective purchasers that consideration may take the form described. The Secretary is required to notify Congress of a prospective conveyance and wait for a period of between 14 and 60 days before entering into an agreement. The Secretary of Defense is required to report annually on his use of this authority.

Effect of the Proposed Amendment

Section 3 of S. 590/H.R. 2295 would reinstate the Secretary's authority to transfer property at any military installation, regardless of its closure or realignment status "without limitation on duration," rendering it permanent.

Outsourcing Services to Municipalities

Current Statute

10 U.S.C. § 2465 prohibits the Department of Defense (DOD) from entering into a contract "for the performance of firefighting or security-guard functions at any military installation or facility." Another provision of law, 10 USC § 2461 note, requires a public-private competition under Office of Management and Budget Circular A-76 before any DOD function being performed by 10 or more DOD civilian employees can be converted to performance by a contractor.

Amendments to that statute³ authorize the Secretaries of the military departments to carry out pilot programs to contract with a county or municipality for certain municipal services. The permitted services include refuse collection, refuse disposal, library services, recreation services, facility maintenance and repair, and utilities. The number of installations permitted to be included in the pilot project is limited to three per military service, and all must be located within the United States.

All pilot program contracts must terminate not later than September 30, 2012.

Effect of the Proposed Amendment

S. 590/H.R. 2295 would create a new statute, 10 U.S.C. 2465a, that would permanently authorize military department secretaries to enter into an unrestricted number of contracts with "a county, municipal government, or other local governmental unit in the geographic area in which [an] installation is located" for the provision of the same municipal services as the pilot program.

The new authority would permit the Secretary concerned to use "other than competitive procedures" if the contract would not exceed five years in duration, if he determines that the price

³ See Act Oct. 28, 2004, P.L. 108-375, Div A, Title III, Subtitle C, § 325; Jan. 28, 2008, P.L. 110-181, Div B, Title XXVIII, Subtitle B, § 2826; and Oct. 14, 2008, P.L. 110-417, [Div A,] Title X, Subtitle F, § 1061(b)(16), 122 Stat. 4613 (effective as of 1/28/2008 and as if included in Act Jan. 28, 2008 as enacted, as provided by § 1061(b) of such Act, which appears as 5 USCS § 6382 note).

for contracted municipal services represents least cost to the federal government, and if his supporting business case describes alternative sources and establishes that contract performance will not increase costs to the federal government. The authority to make the necessary determinations could not be delegated below the level of the Deputy Assistant Secretary for Installations and Environment (or DOD equivalent). The Secretary would have to notify the Committee on Armed Services of the House and of the Senate of any such contract 14 days before it could become effective.

Subsection (c) of this section of the proposed amendment appears to reference the original pilot program for contracted municipal services. The pilot program was originally created under Section 325(f) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005⁴ and authorized only the Secretary of the Army to initiate two such contracts that would terminate not later than September 30, 2010. A 2008 amendment⁵ expanded the pilot program to all military departments, raised the limit to three contracts in each, and reset the termination date to September 30, 2012. This new legislation would permit these pilot program contracts to terminate as late as September 30, 2020.

Federal Reimbursements for Military Site Cleanup

Current Statute

Section 211 of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499) required the Secretary of Defense to establish a Defense Environmental Restoration Program to clean up environmental contamination and address other safety hazards on current and former military installations in the United States, subject to appropriations. The Secretary is authorized to enter into agreements to reimburse other entities for expenses they may incur in participating in the cleanup of a military installation under this program.⁶ These other entities that are eligible for reimbursement include: other federal agencies, state, territorial, or local agencies, Indian tribes, nonprofit conservation organizations, and owners of “covenant” property. This latter category refers to owners of former military property conveyed with a deed that includes a covenant stating the continuing cleanup responsibility of the United States.

Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁷ generally requires contaminated federal property to be cleaned up prior to transfer out of federal ownership. However, additional cleanup may be needed after the transfer if the contamination was found not to have been sufficiently remediated. To address such situations, Section 120(h)(3) requires the deed to a transferred federal property to include a covenant stating the continuing responsibility of the United States to conduct additional cleanup that may be needed subsequent to transfer.⁸ Such a covenant must be included in the deed to all surplus federal property transferred out of federal ownership, on which a hazardous substance was stored for one year or more, was known to have been released, or was disposed of. If the owner of the

⁴ P.L. 108-375, Div A, Title III, Subtitle C, § 325.

⁵ P.L. 110-181, Div B, Title XXVIII, Subtitle B, § 2826.

⁶ 10 U.S.C. § 2701(d).

⁷ 42 U.S.C. § 9620(h).

⁸ 42 U.S.C. § 9620(h)(3).

covenant property wishes to perform cleanup actions that may be necessary after acquiring ownership, the Secretary may enter into an agreement with the owner to reimburse its costs, as the United States ultimately would be responsible for those actions under the covenant.⁹

Historically, the Secretary has most often exercised this agreement authority to reimburse states for the expenses they incur in participating in cleanup decisions at military installations within their jurisdictions. As of the end of FY2007, the Department of Defense had entered into cooperative agreements with 47 states, the District of Columbia, and 4 U.S. territories, to govern the types of expenses that are eligible for reimbursement.¹⁰ These agreements typically allow the reimbursement of expenses that a state or territory may incur in exercising its statutory right under Section 120(f) of CERCLA to participate in the planning and selection of a “remedial”¹¹ action to clean up a federal facility, including the review of available data and the development of studies, reports, and plans.¹²

Under current law, states cannot be reimbursed under these agreements for the costs of enforcement actions they may take against the Department of Defense for failure to carry out a planned cleanup action or to comply with other cleanup requirements.¹³ Whether enforcement action taken by a state may affect the Secretary’s willingness to enter into, or renew, an agreement with such state to reimburse expenses it may incur in participating in cleanup decisions. Nevertheless, the Secretary is not required to enter into these reimbursement agreements, but may do so at his discretion.

Effect of the Proposed Amendment

This section of the proposed legislation would expand the scope of current law to allow the Secretary to enter into agreements for reimbursement of expenses that other entities may incur in “processing” a transfer of federal property, before or after cleanup is performed. Like the agreements for reimbursement of expenses associated with cleanup, the Secretary would not be required to enter into agreements for reimbursement of these processing expenses. Rather, the Secretary would be authorized to do so at his discretion. Although the title of the section, “Reimbursable Activities under the Defense-State Memorandum of Agreement Program,” implies that this provision would apply only to agreements with states, the entities that would be eligible for reimbursement of these processing expenses would be the same as those under current law for reimbursement of expenses associated with cleanup: other federal agencies; state, tribal, or local agencies; Indian tribes; nonprofit conservation organizations; and owners of covenant property.

⁹ The United States is usually held responsible for further cleanup of contamination that it caused, to the extent necessary to make the property suitable for the land use specified in the deed. If the owner later decides to use the property for another purpose that would require additional cleanup, the owner ordinarily is held responsible for the additional costs. Further, a deed may restrict the use of the land to a purpose(s) that would be suitable relative to the level of cleanup performed by the United States. Such restrictions are sometimes used to prohibit certain uses that would require a greater level of cleanup than may be technically or economically feasible.

¹⁰ Department of Defense, *Defense Environmental Programs Fiscal Year 2007 Annual Report to Congress*, March 2008, Appendix Q, p. Q-3.

¹¹ Remedial actions typically are longer term cleanup actions intended to provide a more permanent solution to address potential health and environmental risks. Shorter term actions that address more immediate risks are referred to as “removal” actions.

¹² 42 U.S.C. § 9620(f).

¹³ 10 U.S.C. § 2701(d)(3).

The section does not define what activities would constitute the “processing” of a transfer of federal property, making it unclear as to what specific activities would qualify for reimbursement. Absent such definition in statute, the Secretary presumably would have the discretion to determine what processing expenses may be eligible for reimbursement. In practice, a recipient of federal property could incur legal or administrative expenses in the process of acquiring a property, in addition to the actual cost of the property itself, if payment is required to provide fair market or other value in exchange for the property.

Even though a state may not be the recipient of a property, a state still could incur administrative expenses in its involvement in the transfer of a property before cleanup is complete. Although federal property generally must be cleaned up prior to transfer out of federal ownership, Section 120(h)(3)(C) of CERCLA allows transfer to occur before then if certain conditions are satisfied, including the providing of assurances that the cleanup will be performed and that the land use would be protective of human health and the environment.¹⁴ Transferring a federal property before cleanup is complete is subject to the concurrence of the governor of the state in which the property is located. The review and approval of such property transfers by a governor could result in a state incurring administrative expenses.

The proposed language also is intended to prevent the Secretary from imposing certain conditions on the funding made available through a reimbursement agreement. If the Secretary enters into a reimbursement agreement with another entity, the Secretary would be required not to make the reimbursement conditional upon whether a state may take an enforcement action against the Department of Defense, or upon a state’s willingness to enter into dispute resolution with the Department of Defense to avoid an enforcement action. This requirement would appear to apply to any reimbursement agreement entered into under this authority, including both those that would apply to expenses associated with cleanup and those that would apply to expenses associated with the processing of property transfers.

Base Realignment and Closure (BRAC)¹⁵

On September 8, 2005, the Defense Base Closure and Realignment Commission submitted nearly 200 recommendations to President George W. Bush. These recommendations would fundamentally alter the stationing of military forces and the functions carried out at many posts, bases, and stations throughout the United States, its territories, and possessions.¹⁶ President Bush

¹⁴ 42 U.S.C. § 9620(h)(3)(C).

¹⁵ The term “Base Realignment and Closure,” or BRAC, originated with a 12-member Commission on Base Realignment and Closure created by the Secretary of Defense during 1988 to assess the continued utility of military installations throughout the United States. The Commission recommended the closure of those installations no longer needed for national defense and the rededication of others to new functions.

¹⁶ For more information on the BRAC process, see CRS Report RS21822, *Military Base Closures: DOD's 2005 Internal Selection Process*, by Daniel H. Else and David E. Lockwood; *Military Base Closures: DOD's 2005 Internal Selection Process*, by Daniel H. Else and David E. Lockwood; CRS Report RS22291, *Military Base Closures: Highlights of the 2005 BRAC Commission Report and Its Additional Proposed Legislation*, by Daniel H. Else and David E. Lockwood; *Military Base Closures: Highlights of the 2005 BRAC Commission Report and Its Additional Proposed Legislation*, by Daniel H. Else and David E. Lockwood; CRS Report RS22061, *Military Base Closures: The 2005 BRAC Commission*, by Daniel H. Else and David E. Lockwood; *Military Base Closures: The 2005 BRAC Commission*, by Daniel H. Else and David E. Lockwood; CRS VideoCRS Report MM70068, *Military Base Closures: DOD's Internal 2005 BRAC Selection Process. Online Video. Video Tape.*, by Daniel H. Else and David E. Lockwood; *Military Base Closures: DOD's Internal 2005 BRAC Selection Process*, by Daniel H. Else, et al.; or CRS VideoCRS Report MM70084, *Military (continued...)*

approved the recommendations and, in accordance with the Defense Base Closure and Realignment Act of 1990 (DBCRA), as amended,¹⁷ the Secretary of Defense is putting into effect the entire list prior to September 15, 2011.

The final two sections of S. 590/H.R. 2295 would further amend the DBCRA to expand the indemnification (holding harmless) of persons who have taken title to property on closed military installations and to require the conveyance at no cost of surplus military property under certain conditions.

Indemnification of Transferees of Closing Defense Properties¹⁸

Current Statute

Section 330 of the National Defense Authorization Act for FY1993 (P.L. 102-484) indemnifies all recipients of property on closed military installations from any claim arising from personal injury or property damage resulting from contamination caused by past military activities on such property. This indemnification applies specifically to military properties declared surplus to the federal government under the DBCRA.

As discussed earlier, Section 120(h)(3) of CERCLA states that the United States is responsible for conducting additional cleanup deemed necessary after a property is transferred out of federal ownership, generally relieving the recipient of the property from such responsibility. However, this provision does not address the responsibility of the United States for personal injury or property damage that may result from contamination caused by past activities of the federal government. This potential responsibility for personal injury as a consequence of receiving ownership upon transfer has been perceived as a deterrent to the acquisition of certain surplus federal properties. Section 330 of P.L. 102-484 specifically indemnifies recipients of BRAC property from responsibility for personal injury or property damage resulting from contamination caused by past military activities.

Effect of the Proposed Amendment

This section of S. 590/H.R. 2295 would amend Section 330 of P.L. 102-484 to indemnify recipients of BRAC property not only from responsibility for personal injury or property damage arising from contamination caused by past military activities, but also specifically from environmental remediation (i.e., cleanup) of that contamination. Although Section 120(h)(3) of CERCLA already states that additional cleanup found to be necessary after the date of transfer “shall be conducted by the United States,” this provision does not explicitly indemnify recipients of surplus federal property from responsibility for such additional cleanup.

(...continued)

Base Closures: BRAC Commission and Beyond. Online Video. Video Tape., by Daniel H. Else and David E. Lockwood, *Military Base Closures: BRAC Commission and Beyond*, by Daniel H. Else, et al.

¹⁷ 10 U.S.C. § 2687 note.

¹⁸ *Indemnify*: To save harmless, to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. *Black's Law Dictionary*, p. 910.

This section would explicitly remove recipients of BRAC property from responsibility for cleanup of contamination caused by past military activities and would indemnify them against statutory or regulatory requirement or cleanup order for contamination caused by past military activity. It would also protect the new owners from the costs of compliance with any such requirement or order. In effect, only the United States could be held subject to statutory or regulatory requirements or orders, and the associated costs, to perform additional cleanup of contamination it originally caused.

Requirement for No-Cost Economic Development Conveyances

Current Statute

Section 2905 of the DBCRA specifies the manner in which the Secretary of Defense is to implement the approved recommendations of the Defense Base Closure and Realignment Commission (the BRAC Commission). It grants the Secretary the authority to dispose of excess and surplus property using a variety of methods, such as public sale or auction.

Subsection 2905(b)(4) augments this disposal authority by stating that the “Secretary may transfer real property and personal property located at a military installation to be closed or realigned under this part to the redevelopment authority [sometimes referred to as a Local Redevelopment Authority, or LRA] with respect to the installation for purposes of job generation on the installation.”¹⁹ This is the so-called Economic Development Conveyance (EDC).

If such is the case and the installation was approved for closure or realignment after January 1, 2005, the subsection further requires the Secretary to “seek to obtain consideration in connection with any transfer under this paragraph of property located at the installation in an amount equal to the fair market value of the property, as determined by the Secretary.”²⁰ The statute permits the Secretary to transfer the property to the redevelopment authority under this authority at no cost if the recipient agrees to utilize proceeds from the sale or lease of any portion of the transferred property “during at least the first seven years after the initial transfer to support the economic development of, or related to, the installation,” and executes the agreement of transfer and accepts control of the property “within a reasonable time after the date of the property disposal record of decision or finding of no significant impact under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).”²¹

¹⁹ 10 U.S.C. § 2687 note § 2904(b)(4)(A).

²⁰ 10 U.S.C. § 2687 note § 2904(b)(4)(B).

²¹ 10 U.S.C. § 2687 note § 2904(b)(4)(C). The subsection specifies that only these expenditures are considered appropriate to “support the economic development of, or related to, the installation”:

- (i) Road construction.
 - (ii) Transportation management facilities.
 - (iii) Storm and sanitary sewer construction.
 - (iv) Police and fire protection facilities and other public facilities.
 - (v) Utility construction.
 - (vi) Building rehabilitation.
 - (vii) Historic property preservation.
 - (viii) Pollution prevention equipment or facilities.
- (continued...)

Effect of the Proposed Amendment

The law currently requires the Secretary concerned to seek fair market value consideration for BRAC property transferred to the LRA as part of an EDC, but allows the Secretary the discretion of granting a no-cost EDC under certain circumstances. Under S. 590/H.R. 1959/H.R. 2295, the DBCRA would be returned to the provisions that were in effect on December 27, 2001, essentially removing the fair market value requirement.²² The Secretary would no longer have the *discretion* to grant a no-cost EDC. He would be *required* to transfer the property to the LRA at no cost as long as the LRA agrees to certain requirements.

The amendment would also require the Secretary of Defense to prescribe regulations to implement the revived provisions within 60 days of enactment. The Secretary is to “ensure that the military departments transfer surplus real and personal property at closed or realigned military installations without consideration to local redevelopment authorities for economic development purposes, and without the requirement to value such property.”²³ Because the proposed legislation is silent on the question of its applicability to the 2005 round versus earlier base closures, it is unclear what impact, if any, this change would have on property now or in the future being transferred as part of the 2005 BRAC round. Arguably, any agreements not concluded by the date of enactment of the bill would be subject to the new framework and would be eligible for transfer at no cost. It is uncertain if the bill would allow the LRA to modify its redevelopment plan to include a no-cost EDC that was not previously recommended.

Issues for Congress

Although the introductory sections of S. 590 and H.R. 2295 state that the legislation’s purpose is to enhance communities’ ability to recover from installation downsizing or to adjust the military population growth, the discussion above indicates that the potential impact of the proposed legislation could extend beyond the current BRAC round. As Congress considers these bills, Members may wish to weigh questions such as the following:

- If current law permanently authorizes DOD to exchange property on closing or realigning military installations for non-DOD property that could increase its supply of housing or ease encroachment pressure, to what extent does extending the authority to all excess DOD property serve to satisfy the stated purpose of the legislation—assisting communities to recover from the effects of base resizing or closure?

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(ix) Demolition.

(x) Disposal of hazardous materials generated by demolition.

(xi) Landscaping, grading, and other site or public improvements.

(xii) Planning for or the marketing of the development and reuse of the installation.

²² The late December 2001 amendment to the Defense Base Closure and Realignment Act of 1990 that authorized the 2005 base closure round inserted the “fair market value” requirement and substituted “may” for “shall” in permitting the Secretary to effect an EDC without consideration when the LRA agreed to reinvest sale and lease proceeds and took timely control of the property.

²³ S. 590, 111th Cong. (2009).

- What are the risks and benefits relative to the merits of authorizing the military departments to outsource base support, such as refuse removal, the operation of golf courses, libraries, and fitness centers, and public works functions, to county or local governments rather than provide for them through DOD employees or private contractors?
- Are there advantages in broadening the Secretary of Defense's ability to reimburse agencies and organizations for military site cleanup activities to include expenses associated with "processing" of a conveyance of the property? If there are disadvantages, what are they, and could they decrease the Secretary's willingness to enter into reimbursement agreements?
- An extension of indemnification to include removal of statutory and regulatory requirements for site cleanup of past military activity will effectively add to the cost of remediation borne by the federal government and correspondingly reduce the burden on the state or locality near the site or the new owners. What are the implications for future federal costs?
- Current law requires the Secretary of Defense to "seek fair market value" for surplus 2005 BRAC property conveyed to redevelopment authorities for the purposes of job creation on the former military site. Nevertheless, the Secretary is permitted to execute such an Economic Development Conveyance for no consideration (at no cost) under certain circumstances. Existing statute requires that all "proceeds received from the lease, transfer, or disposal of any property at a military installation closed or realigned" be used only to defray the cost of implementing BRAC recommendations or remediating environmental degradation on BRAC-surplus property.²⁴ If the Secretary is required to convey surplus property at no cost, revenue could be lost that would have to be replaced by appropriated funds. What are the advantages and disadvantages of foregoing this potential revenue stream?
- How much in toto will these proposed changes cost the federal Treasury relative to the benefits gained by federal agencies, local governments, and private enterprise?

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²⁴ 10 U.S.C. 2687 note, Secs. 2906 and 2906A.